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Supreme Court of the United States

OCTOBER TERM, 1951

No. 264

DORA COLEMAN

v.

J. HOWARD MCGRATH, ET AL.

Appeal from the United States District Court for the District of Columbia.

REPLY BRIEF FOR APPELLANT.

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I. The Constitution Applies to Deportation Proceedings.

1. The government's brief, lengthy as it is, amounts to little more than a plea that this Court reaffirm the doctrine of *Fong Yue Ting* v. *United States*, 149 U. S. 698. It makes this plea despite the fact that the statute upheld by the Court in that case denied the alien due process of law in the most elemental sense. The statute accorded the alien as much (or, rather, as little) due process of law as was accorded the non-resident alien in *United States ex rel Knauff* v. *Shaughnessy*, 328 U.S. 537, and the enemy alien

in *Ludecke* v. *Watkins*, 335 U.S. 160. The Court reached its decision in the *Fong Yue Ting* case quite logically, because it considered resident aliens to have the exact status and the same degree of constitutional protection, i.e., none, as aliens outside the country or as enemy aliens. But for the Court to reaffirm the *Fong Yue Ting* doctrine today would require it to reverse all of its subsequent opinions that resident aliens are entitled to due process of law and stand on a completely different footing from aliens not present in the country or from enemy aliens.

2. The contention that *Fong Yue Ting* is controlling also impels the government to request that the Court repudiate its well-settled position that deportation constitutes punishment. To support this request, the government argues that the purpose of Congress in enacting deportation statutes generally, and the present statute in particular, is not to punish the individual, but to protect the national interest.[1] But to determine the character of legislation by such a subjective test as the motives of Congress is neither intelligible nor permissible. Whatever Congress' purpose, and whatever the nature of the power it here invoked, the statute involved does inflict punishment on the individuals affected.

The question as to whether criminal penalties are or should be imposed for the purpose of punishing individuals, or for the welfare and safety of the state, or for the rehabilitation of the criminal has long been a perplexing philosophical problem on which varying views have been expressed by Plato, Aristotle, Thomas Aquinas, Kant, Hegel, Bentham and Holmes, among others. See Michael and Wechsler, *Criminal Law and its Administration* (1940 ed.) pp. 6 et seq. But it has never been suggested that these different philosophical approaches could alter the

[1] The government does concede that some members of Congress may have had vindictive motives so far as the present statute is concerned (Br. pp. 115-116).

nature of a thirty year jail sentence. Nor has this Court ever considered that the particular philosophical approach that may have motivated a legislature in imposing a criminal penalty was relevant in determining the answer to a constitutional problem.

What makes deportation punishment is the character of the act itself and its effect on the individual, not the motives of Congress. There can be little question that so far as the appellant is concerned, she would much prefer a jail sentence to deportation and permanent exile and separation from her family and from "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284. The logic of the government's position would permit Congress to jail any alien indefinitely so long as it did it for noble and pure motives.[2]

3. The government contends that the decision to deport the appellant is a "political" decision not subject to judicial review.[3] The deportation of the appellant is then analogized by the government to a declaration of war, the signing of a treaty, and the general conduct of international relations. Accordingly, the government argues, the arbitrary deportation of an alien "without a hearing, or simply for personal reasons of the executive. . . . or because of religious faith" is not the business of this Court, although it may be the subject of a diplomatic complaint (Br. at p. 69).

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[2] Indeed, the Internal Security Act of 1950 apparently provides for the indefinite jailing of aliens where their deportation cannot be accomplished. 8 U. S. Code sec. 156.

[3] Oddly enough the government finds support for this thesis in *Ludecke* v. *Watkins*, 335 U. S. 160, which sustained the constitutionality of the Alien Enemy Act of 1798, although the Court in that case took great pains to distinguish between the Alien Enemy Act of 1798 and the Alien Act of the same year, indicating that the constitutional problems posed by an act involving non-enemy aliens bore no relation to those of an act limited to enemy aliens. See fn. 18 at p. 171 of the Court's opinion.

It is perfectly evident, however, that the only relation present in this case is the relation between the appellant and the government of the United States. The situation, whatever it may be, with regard to emissaries from foreign governments or temporary visitors or aliens who entered this country pursuant to treaty, obviously has no bearing on the case of the appellant who came here nearly forty years ago for permanent residence and at the present time has no ties to any country other than the United States. The country of her birthplace would not only not register a diplomatic complaint against her deportation but would refuse even to accept her. See *Saksagansky* v. *Weedin*, 53 F(2d) 13, 16. Indeed, Congress has recognized that many aliens such as the appellant cannot be deported to the country of their birthplace and has sought to deal with the problem by measures other than deportation. See 8 U.S. Code sec. 156.

To advance the thesis that the present case poses a problem of international relations is to employ language without regard to the meaning of the words. It also asks this Court to shut its eyes to the plain realities before it. Everyone knows that the overwhelming majority of resident aliens in this country admitted for permanent residence came here to make this country their home, cutting off all ties with the country of their birth.[4] Our welcome of such aliens has long been our tradition and our boast. The treatment of domiciled aliens is a domestic problem even though it sometimes, unlike this case, may also include overtones of international relations.

Furthermore, even if the power to deport rests on the same footing as the power to wage war, this does not "remove constitutional limitations safeguarding essential liberties". *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 426; *Ex parte Endo*, 323 U.S. 283, 298-299.

4. The government concedes, as it must under decisions of the Court, that deportation proceedings must conform

[4] See *United States ex rel Klovis* v. *Davis*, 13 F. (2d) 630.

to the constitutional requirements of due process of law. It is logically impossible to reconcile this concession with the doctrine that the power to deport is absolute and not reviewable by this Court. Either the Fifth Amendment applies to deportation proceedings, or it does not. It is impossible to understand why it should control the procedure of deportation but not its substance.

The government also concedes that there is a requirement that Congress in enacting deportation statutes "make its intention plain" (Br. at 57). But this is a constitutional requirement the "essential purpose of . . . [which] is to warn individuals of the . . . consequences of their conduct." *Jordan v. DeGeorge*, 341 U.S. 223, 230. If Congress cannot constitutionally enact a deportation statute which fails to give aliens adequate warning of what conduct will subject them to deportation, *a fortiori*, it may not constitutionally enact a statute, such as the present one, which gives the aliens no warning at all but orders them deported for conduct already completed.

II. The Ex Post Facto Clause.

The government concedes that the scope of the *ex post facto* clause is not limited to criminal statutes, but extends to other statutes as well if some punishment or penalty is involved. The government seeks however, to avoid the application of the *ex post facto* clause to the present case by insisting, in the face of the repeated pronouncements of this Court, that deportation is not punishment. The argument of the government that the character of an act as punishment is to be determined not by the effect of the act on the individual, but by the subjective test of the purity of Congressional motives or the nature of the Congressional power (Br. 115-116) has already been fully discussed herein.

III. The First and Fifth Amendments.

1. The government argues that even if the power of Congress is not absolute as declared in the *Fong Yue Ting* case, it was here reasonably exercised and therefore should be sustained. Curiously enough, the contention that the power was reasonably exercised is supported on the grounds that Congres has "plenary" power over aliens, and that deportation does not constitute punishment. The government concludes its argument on this point with the assertion that the present statute is as rational as that sanctioned in *Fong Yue Ting*[5] (Br. 94-95). Thus although the government ostensibly argues on the supposition that the power to deport is subject to constitutional restrictions, the content of the argument consists of a reiteration of the doctrine of *Fong Yue Ting* that the power is absolute and that deportation does not constitute punishment.

Of even greater significance, is the documentation in the government's brief demonstrating that Congress passed this statute and justified its reasonableness on the basis of the doctrine of *Fong Yue Ting* (Br. pp. 70-71, fn. 38, pp. 76-78). Since Congress passed this statute believing in its absolute power over aliens, it found no need to consider the doctrine of rational relationship as established by this Court. Consequently, it made no judgment on the question to which this Court should give deference. Nor, in the absence of a Congressional judgment on this question, would it appear to be appropriate for the Court to make its own judgment, particularly since the legislative material set out in the government's brief (pp. 70-71, 76-78) indicates that the Congressional judgment might well

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[5] It is difficult to believe that the government seriously defends as rational a statute which, operating on the assumption that all Chinese are liars, requires a Chinese alien to produce a white witness to events with which only Chinese would normally be conversant. But the government's brief must speak for itself.

have been different absent Congress' conviction that it had an absolute power over aliens.[6]

2. The government concedes (Br. pp. 91-92) that the present statute requires the deportation of individuals who "cannot be said to be dangerous to the United States" and that, on the record before the Court, the appellant falls within that category. This is permissible, argues the government, because the alternative before Congress was to require proof in each case that the alien was "dangerous to the United States" before he could be deported. This requirement, according to the government, would present an extremely difficult problem of proof, and in a great many instances might result in the failure of the government to make out a case.

If the constitutional requirement of due process of law has any meaning, it is that each individual must be accorded a full and fair hearing on his own case. *Cf. Stack* v. *Boyle*, No. 400, this Term. It has never before been considered that such a hearing should be dispensed with on the ground that the proof would only serve to defeat rather than sustain the government's position.

The government looks for support for this aberration to *Hirabayashi* v. *United States*, 320 U.S. 81 and *Korematsu* v. *United States*, 323 U.S. 214. The measures taken in those cases were justified solely as temporary emergency measures necessitated by the threat of imminent invasion of our Pacific Coast and the absence of time or opportunity to discriminate between the guilty and the innocent. The difficulty in those cases of choosing between the guilty and the innocent was not one of proof, but solely one of lack of time in an emergency. This Court refused to give vitality to the doctrine of these cases beyond the immediate emergency which called it into play. *Ex parte Endo*, 323 U.S. 283. There is no warrant to extend the doctrine of these cases to cover the present situation before the Court.

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[6] See, e. g., the remarks of Representative Hobbs, the chief proponent of the bill, set out at pp. 77 of the government's brief.

Conclusion.

We do not share the government's optimism (Br. 67) that "it is not to be assumed that Congress will arbitrarily exercise this absolute power" over aliens which the government asserts to exist. The statute involved in *Pong Yue Ting* and that involved in this case demonstrate that Congress has arbitrarily exercised the deportation power. The Bill of Rights was adopted precisely because the people who had just fought a war for freedom felt that neither Congress nor anybody else could be trusted not to arbitrarily exercise absolute power.

The government invoking the spurious cry of "security" (see Jackson, J., dissenting, in *United States ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537, 551.), insists that Congress should be free to act like a Nazi government toward aliens. We think that our society has no room for such a contention.

Respectfully submitted,

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